I like the contract cost accounting and compliance side of government contracting more than I like the contracting and subcontracting side of government contracting.

There. I said it. Deal with it.

I've done most of what can be done in the field—at least, what can be done as a contractor. I've never been a government employee. I've managed prime contracts; I've managed subcontracts. I even ran a procurement shop for a relatively brief while. I've been a program manager for a multi-million CPAF task order and came close to getting 100% of the available award fee from the US Navy. I did Small Business reporting and I ran the company's Mentor/Protégé Program, and I received some awards that said I did well. Once, in a fit of madness, I agreed to oversee the company's Government Property Management System. I even led development of a new subcontracting/procurement tracking and reporting system for a multi-billion-dollar engineering services provider, which linked acquisition transactions to the property system to eliminate all the duplicative data entry that had been going on for more than a decade.

So I've held many acquisition-related roles in my long career.

I didn't really enjoy those roles.

That's not to say I didn't learn or gain valuable experience from those assignments. I certainly did. But "experience is what you get when you didn't get what you really wanted." I performed my responsibilities with diligence, but over time I realized it wasn't what I wanted to be doing.

I wanted to be dealing with the finance side, not the contracting side.

The reason I didn't find the acquisition roles especially enjoyable is that dispute resolution was difficult.

If you have a prime contract matter in dispute, you have your contract's Disputes clause and you have FAR Part 33. Things aren't too bad. The main problem is that 95% of all contractors don't want to exercise their contractual rights because they are afraid to upset the customer. Thus, you typically fall back on negotiation and persuasion—which is fine in most cases. But if you run into a difficult Contracting Officer then you are going to end-up caving more often than not—in the name of "customer relationships." (Why you would want to continue a relationship with such a difficult customer remains a mystery to me.)

If you are in a prime/subK relationship, things are more muddied and disputes are more difficult to resolve. In fact the hardest aspect of being a subcontractor is when you know you are right but the prime simply refuses to listen. If you have a difficult subcontractor manager there is almost nothing you can do about it, short of going to court. As a consultant, a decent percentage of my workload involves advising subcontractors on strategies to deal with disputes with their primes.

Client confidentiality prohibits me from giving too many details in support of my assertions. But I will say that I had one memorable situation where I was asked to advise on a multi-million-dollar prime/subK dispute where the prime contractor and subcontractor were sister divisions of the same company. That's right—they were actually in an inter-organizational transfer (IOT) situation and *not* in a prime/subcontractor relationship—and yet the "prime" continued to treat the "subcontractor" as if it were managing a FFP subcontract. (It clearly wasn't; see FAR 31.205-26.) Months passed, and we could not get the "prime" to understand the true relationship. That's an example of how dispute resolution is so much more difficult than it needs to be when there is a problem between a prime and a subcontractor. (Also: see our articles on litigation between primes and subKs. There are several of them on the site.)

In contrast, on the financial side of things, there is a defined route for dispute resolution. If you have a disagreement with auditors, you can write a Contractor's Response, which goes into the audit report. If necessary, you can write another rebuttal directly to the Contracting Officer. (Sometimes you are even required to do so.) If that doesn't work you have defined appeal rights, either at a Board of Contracting Appeals or at the U.S. Court of Federal Claims. Sure, the latter course of action involves attorneys and is expensive (and frustratingly long), but if you care enough (and there is sufficient money at stake) you can avail yourself of the Judicial Branch of our government, in the hope that somebody will put a check on the rapacious grasp of some Executive Branch bureaucrats.

No matter if you're dealing with a difficult audit report or a difficult CO, you can actually force a Contracting Officer to make a decision, as Fluor Federal Solutions LLC (Fluor) **recently**

demonstrated
at the Armed Services Board of Contract Appeals. The dispute is interesting and I'll discuss it here, but readers need to know that there is not yet a resolution. I'm writing about the decision because it illustrates how contractors have opportunities to force governmental action.

Fluor had a contract with the US Navy and, during performance, submitted a large Request for Equitable Adjustment (REA). According to the Board's decision, the REA was a consolidation of many other, smaller, REAs that had already been submitted. Judge Woodrow, writing for the Board, found that—

The 96 page consolidated REA included a detailed narrative of the facts giving rise to the REA and was accompanied by 70 attachments and 2 appendices. The consolidated REA addressed matters that had all been raised in a series of separate REAs that Fluor submitted in 2013 and 2014, which the Navy either rejected with little or no comment, or failed to address at all. Seven months later, the Navy, on 3 February 2016, denied Fluor's consolidated REA, stating that additional information provided in the REA submission had not warranted the government to reverse its original denials of the earlier REAs. Fluor then submitted its consolidated claim on 30 September 2016.

(Internal citations omitted.)

Judge Woodrow used the terms "REA" and "claim" to describe different aspects of the Fluor/Navy dispute. Let's dig into those two terms. Fluor submitted a consolidated REA in late June, 2015, which was denied in February, 2016. Fluor then submitted a "claim" on the same facts and alleged entitlements on September 30, 2016. Essentially Fluor gave up more than a year's worth of interest by treating an REA as being separate and distinct from a claim. That's consistent with how many contractors approach dispute resolution with their government customers. Many contractors like to think that an REA is relatively benign, and that a certified claim is an escalation from an REA, which is triggered by an impasse between the parties.That viewpoint isn't necessarily correct, nor has it been since 1995 As Vern Edwards has **pointed out** in one of his WIFCON blog articles—

The determination of whether a contractor's submission to a CO is or is not a claim does not depend on what the parties call it. The mere fact that a contractor calls its submission a claim will not make it a claim if it lacks any necessary element of a claim. And calling a submission an

REA does not mean that it is not a claim if it possesses all of the necessary elements of a claim. Claims and REAs are not categorically different things. It is the content of a submission, not what the parties label it or call it, that determines whether it is a claim. …

An REA valued at more than the simplified acquisition threshold that includes the REA certification, but not the claim certification, is an REA that is not a claim, because it lacks one of the necessary elements of a claim. If the same REA is certified as a claim, and has the other necessary elements of a claim, then it is an REA that is a claim.

What if a contractor includes both the REA certification and the claim certification? Assuming that the REA has all of the other necessary elements of a claim, it is an REA that is a claim, notwithstanding the inclusion of the REA certification. However, the dual certification might indicate some confusion on the part of the contractor and make its intentions unclear.

Bottom line: An REA is a claim if it has the required elements of a claim as defined in FAR 2.101. An REA that lacks any required element of a claim is not a claim.

Vern's 2012 blog article at WIFCON is outstanding, chock full of important information relevant to the topic of dispute resolution, and I've quoted just a bit of it. I urge readers to follow the link and read the entire article. Consider printing it out and saving it. It's that good.

Anyway, back to Fluor and its claim.

Even though the Navy denied Fluor's original consolidated REA after seven months of considering it, the CO took the claim a bit more seriously. The Navy CO told Fluor that DCAA would audit the claim. The Contracting Officer promised to issue a decision on Fluor's claim by April 28, 2017—seven months after Fluor had submitted it.

"Beginning in November 2016 through 15 May 2017, Fluor organized and participated in multiple in-person meetings and telephone conferences requested by DCAA regarding the claim, and provided written responses to DCAA's written requests." However, DCAA didn't complete its procedures in time (surprising nobody who reads this blog), and the CO told Fluor

that the DCAA audit completion date had slipped to July 31, 2017—and that a Contracting Officer Final Decision (COFD) on the merits of Fluor's claim would be issued by December 31, 2017—fourteen months after Fluor had submitted it and 29 months after Fluor had submitted its original REA (that apparently was not a claim).

Meanwhile, the DCAA audit had come to a halt and there was no interaction between auditors and auditee for four months. Finally, on September 21, 2017, "DCAA repeated requests to which Fluor had already responded in writing on 20 January and 15 March 2017. Fluor responded to DCAA's request on 25 September 2017, repeating its previous responses, which explained it did not maintain certain records in the manner DCAA requested and expressed Fluor's willingness to answer specific questions regarding the data used to price the claim and provide DCAA an additional walkthrough of the data."

The situation described above is not that unusual. DCAA often requests data to be prepared in certain formats in order to facilitate the audit. The "art" of audit liaison often lies in preparing unique reports and/or giving the auditors what they want, but not necessarily in the manner in which it's been requested. However, that didn't seem to work in this case, because the next interaction between Fluor and DCAA was when Fluor received a "Formal Request for Access to Records," in which DCAA asserted that Fluor had records to which auditors were not being given access. (Typically, receipt of that document sets of another chain of dispute resolution that can—but shouldn't—end with receipt of a subpoena.)

According to the Board's Statement of Facts: "Fluor repeated, in a letter to DCAA dated 31 October 2017, its earlier offers to respond to any DCAA concerns, as Fluor had provided all of the information available and was willing to meet with DCAA representatives. DCAA never responded [to that letter]." A month later, DCAA informed Fluor that it was canceling its audit.

Fluor took the Navy to court to force the Navy CO to issue a Final Decision.

Judge Woodrow wrote—

The Navy contends that Fluor is largely responsible for the CO's inability to issue a final decision and Fluor should not be rewarded for this behavior. … The Navy also argues that Fluor has refused to provide DCAA access to all relevant factual data.

Fluor … disagrees with the Navy's assertions that it has not cooperated with DCAA. … According to Fluor, DCAA has requested data and reports organized in a specific format that is inconsistent with how Fluor ordinarily maintains the data and according to the FAR, is under no obligation to create records for DCAA … Fluor emphasizes that the Navy has had more than two years since the submission of its consolidated REA …to develop its position on entitlement. During this time, Fluor asserts that it has made numerous attempts to meet with Navy representatives to discuss the claim but has been rebuffed and that it has made every reasonable accommodation in responding to DCAA inquires, but has no obligation to reorganize its records or to create records to suit DCAA.

After reciting the Statement of Facts and the parties' contentions, Judge Woodrow wrote—

Here, the consolidated claim is clearly large and complex. However, the Navy has had the information regarding the consolidated REA and claim for over two years. Given the history and number of promised COFDs and the present situation where it is unclear when the CO will be issuing a final decision, it seems the parties have reached a stalemate which most likely will not be broken by agreement. Accordingly, the Board hereby directs the CO to issue a decision on the contractor's claim by 31 January 2018.

I didn't set out to make this article about Fluor's battle with the Navy. But it seems to be a good illustration of what works in dispute resolution, as well as some of the potential process pitfalls. Of course this is a story of a dispute between a prime contractor and its government customer. As we noted, that's a relatively easy situation to resolve, compared to a dispute between a subcontractor and a prime contractor. Regardless of what situation you are in, if you have a dispute to resolve, start by reading your contract (or subcontract). Understand the dispute resolution process the contract/subcontract outlines. Understand your rights and your rights of appeal. Understand the differences between an REA and a claim. Then get good advice (hopefully you will get a good attorney to advise you), and follow the dispute resolution path toward conclusion.